

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of: the Application of Affinity Corporation and Network US, Inc. for Authority to Transfer the Assets, Including the Certificate of Affinity Corporation, an NDIEC Operating in California, to Network US, Inc.

Application 01-05-040
(Filed May 15, 2001)

O P I N I O N**Summary**

This decision concludes that the acquisition of the assets and the certificate of public convenience and necessity (CPCN) of Affinity Corporation (Affinity) by Network US, Inc. (Network) is not void, because it should not be subject to the advance approval requirements of Public Utilities Code Sections (Section) 851 and 854. As a result, Network's acquisition of Affinity's assets and CPCN is approved.

Parties to the Transaction

Affinity is a Wisconsin corporation authorized to do business in California. Its principal place of business is 20875 Crossroads Circle, Suite 400, Waukesha, Wisconsin 53186. By Decision (D.) 91-12-056 and D.93-04-063, Affinity was granted a CPCN to operate in California as an interLocal Access and Transport Area (LATA) and intraLATA inexchange service reseller (U-5249-C), respectively.

Network is an Illinois corporation authorized to do business in California. Its principal place of business is 20875 Crossroads Circle, Suite 400, Waukesha, Wisconsin 53186.

The Transaction

On February 2, 2001, Affinity was acquired by Network's wholly-owned subsidiary, CAA, Inc., which then merged into Network.

Prior to the transaction, Affinity owed several million dollars to Sprint, Affinity's underlying carrier. Sprint was on the verge of turning off Affinity's service, which would have resulted in the disconnection of Affinity's customers. In addition, Affinity was indebted to Finova Mezzanine Capital, Inc. In an effort to avoid interruption of service, Affinity entered into a foreclosure sale agreement very quickly without the opportunity to obtain prior approval from any of the state regulatory commissions under whose jurisdiction it operates. Subsequently, it filed for the required approvals.

The applicants entered into an unwritten agreement whereby Affinity will continue to provide service pursuant to its CPCN until such time as this application is granted. Notices were sent on February 20 and 21, 2001 to Affinity's customers notifying them of the transaction, and giving them the opportunity to switch to another carrier. The customers were told that any fee imposed for making the change would be at Network's expense. Applicant represents that there will be no interruption of service, and no change in the rates or terms and conditions of service to customers.

Discussion

In a situation where a company that does not possess a CPCN desires to acquire the assets and CPCN of a company that does possess a CPCN, we must review the transaction in advance. That review would normally apply the same

requirements to the acquiring company as would apply to an applicant seeking the type of CPCN held by the acquired company. Since Affinity possesses a CPCN to act as a reseller of interexchange telecommunications services, we would normally apply the requirements for such authority to Network.

In this situation, advance approval was not sought. As a result, the transaction is void unless we should exempt it from the provisions of Sections 851 and 854. The applicants represent that Affinity could not obtain the Commission's approval in advance of the acquisition because it had run out of money as described above. If Affinity had not entered into the sale, it would have had to discontinue service to its customers. For the same reasons, the affected customers could not be provided with 30 days' advance notice. If we were to void the transaction because it took place without prior authorization, Affinity's customers would have their service discontinued. We find the unique facts of these extraordinary circumstances allow an exemption from Sections 851 and 854 to be granted. However, we caution the applicants and others similarly situated that we can only grant relief in extraordinary circumstances.

The strict requirements of Sections 851 and 854 ensure that "before any transfer of public utility property is consummated", the Commission will, "review the situation and take such action, as a condition to the transfer, as the public interest may require." (San Jose Water Company. (1916) 10 CRC 56; see also, In re E. B. Hicks Water Company (1990) 37 CPUC2d 13.) Only Section 853 gives the Commission authority to determine that certain transactions or types of transactions need not be subject to the full review requirements of the statute, if exemption from review is in the public interest. The public interest test in Section 853 is not met by ordinary transactions that were completed without Commission review as a result of oversight or a business decision to ignore the

requirements of the Public Utilities Code. This Commission has a clear practice of invoking Section 853 only to address certain practical difficulties created when transactions have been voided in “extraordinary circumstances.” (E.g., Re Pacific Gas and Electric Company (1999) [D.99-02-062] 1999 Cal.P.U.C. Lexis 59, Lexis p. 9.) The Commission has made clear the application of Section 853 must be a “seldom used procedure.” (Ibid.) Frequent reliance on Section 853 would create an exception that swallowed the rule. If the Commission relied regularly on Section 853, it would effectively amend the clear requirements of the other 850 series sections out of the Public Utilities Code. This Commission is not empowered to take such legislative action. In addition, there is no harm in letting this transaction go forward.

The Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who desires to act as a reseller of interexchange service must demonstrate that it has a minimum of \$25,000 in cash or cash equivalent, reasonably liquid and readily available to meet the firm’s start-up costs. In addition, the applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business. Network provided financial statements that demonstrate that it has sufficient resources to meet our financial requirements. It also provided information on its management that demonstrates that it has sufficient knowledge and experience to satisfy our requirements. Therefore, we are not concerned that Network is not a proper acquirer of Affinity.

Public Utilities Code Section 2883.3 requires that, before a telephone corporation transfers its customers to another telephone corporation, written notice be given to the affected customers 30 days before the transfer. The notice must include the following:

- A straightforward description of the transfer.
- All applicable rates terms and conditions.
- A statement of the customer's right to transfer to another telephone corporation.
- A toll-free customer service telephone number for the purpose of responding to customers' questions.

In addition, the transfer must be effectuated without charge to the customer.

The customer notices that were sent on February 20 and 21, 2001, complied with the above requirements except that they were sent after the fact. In addition, Public Utilities Code Sections 851 and 854 require Commission approval before Network can acquire Affinity's assets and CPCN. Since Affinity will continue to provide service pursuant to its CPCN until such time as this application is granted, Network has not been providing service without authorization. The public interest is not limited harmed by allowing this transaction to proceed since notice was given to customers. .

Procedural Background

In Resolution ALJ 176-3064, dated May 24, 2001, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Therefore, a public hearing is not necessary, and it is not necessary to alter the preliminary determinations.

Comments on the Draft Decision

This is an uncontested matter in which the decision grants the requested relief. Therefore, pursuant to Section 311(g)(2) of the Public Utilities Code, the

otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Network has sufficient financial resources to meet the Commission's requirements to resell interexchange services.
2. Network possesses the necessary technical expertise required by the Commission.
3. The customer notices sent on February 20 and 21, 2001 complied with the requirements of Public Utilities Code Section 2883.3, except that they were sent after the fact.
4. Advance approval for the sale and transfer of customers could not be obtained from the Commission, and advance notices could not be sent to customers, because (1) Sprint was on the verge of turning off Affinity's service due to an unpaid debt, and (2) Affinity was indebted to Finova Mezzanine Capital, Inc.
5. Affinity will continue to provide service to customers pursuant to its CPCN until such time as this application is granted.
6. If the applicants had waited to get advance approval for the transaction, Affinity would have had to discontinue service to its customers.
7. If the Commission were to void the transaction because it took place without prior authorization, Affinity's customers would have their service discontinued.
8. It is in the public interest to exempt this transaction from the requirements of Public Utilities Code Sections 851 and 854, so that the transaction not be void.
9. Exemptions may only be granted in extraordinary circumstances.
10. The acquisition of Affinity by Network is not void.

11. Notice of this application appeared on the Commission's Daily Calendar on May 23, 2001.

12. There were no protests to this application.

13. No hearings are necessary.

Conclusions of Law

1. Network meets the Commission's requirements for the issuance of a CPCN to resell interexchange telecommunications services.

2. Network is not providing service to customers without a CPCN.

3. The Commission should not void the transaction.

4. The public interest requirements of Section 853 are met in this case.

5. The public interest requirements of Section 853 apply only in extraordinary circumstances, and when we find it is in the public interest to apply that section, not when transactions are improperly completed merely as a result of oversight or a business decision not to seek advance review.

6. In order to facilitate implementation of this transaction, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The transaction in which Network US, Inc. (Network) acquires the assets and the certificate of public convenience and necessity (CPCN) of Affinity Corporation (Affinity) is exempted from the requirements of Public Utilities Code Sections 851 and 854.

2. Network shall comply with the Commission's rules and regulations for non-dominant interexchange carriers set forth in Decision (D.) 93-05-010 and D.90-08-032, as well as all other applicable Commission rules, decisions, General

Orders, all statutes that pertain to California public utilities, D.91-12-056, and D.93-04-063.

3. Network shall file tariffs within 30 days of the effective date of this order to reflect the acquisition of Affinity's CPCN.

4. Network is assigned the corporate identification number of Affinity Corporation (U-5249-C).

5. This application is closed.

This order is effective today.

Dated _____, at San Francisco, California.